IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-264

BRADFORD BROWN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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Bradford Brown petitions for a writ of certiorari to review a judgment of the District of Columbia Court of Appeals in the above-captioned case.

OPINION BELOW

The opinion of the District of Columbia Court of Appeals in *Brown v. United States* (App. A, *infra*) is reported at 372 A.2d 557. There was no opinion in the trial court.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on April 14, 1977. By order of July 13, 1977, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including August 15, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

I. Whether the appellate court erred when it refused to remand to the trial court for a hearing on the circumstances of the destruction of a piece of evidence that should have been produced under the discovery rules and might have exculpated the defendant.

II. Whether in deciding the destruction of evidence issue, the appellate court erred in affirming the conviction on the grounds that no sanctions could have properly been imposed because the evidence had been lost and destroyed inadvertently and because it was impossible to know whether the missing evidence would have exculpated the defendant.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

At all times relevant to this petition, Rule 16(b), Superior Court Criminal Rules, provided:

> (b) Upon motion of a defendant, the court may order the prosecutor to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are in the

> possession, custody, or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable.

The Fifth Amendment to the United States Constitution provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

On November 2, 1974, as Rodney Frazier, Jr., was climbing the steps of his home, an armed man came out of the house, shot and killed Mr. Frazier, and fled. The identity of the killer was the issue at the trial of this case. The defendant, Bradford Brown, who was arrested and charged five months later, has steadfastly maintained his innocence. He was tried by a jury sitting in the Superior Court of the District of Columbia, and he presented an alibi and mistaken-identity defense. He was convicted and sentenced to a term of not less than eighteen and one third years.

One critical piece of evidence – a note written by the murderer minutes before he shot Rodney Frazier – was missing at trial. The defendant, Bradford Brown, claims that the note, if available, would have contained the handwriting of someone other than himself and would therefore have clinched his defense in this case.

The note came into the possession of the police in the following manner: At about 9:30 p.m. on November 2, 1974, Margaret Holten, step-mother of the deceased, Rodney Frazier, was standing in front of her house at 1601 W Street, S.E., Washington, D.C.. A man she did not know approached

her and asked if her husband, Irving Frazier, were at home. Ms. Holten replied that Mr. Frazier was not at home, having gone to the store, but that he would be home shortly. The stranger then asked to use a phone, and Ms. Holten directed him to a pay phone at a nearby store.

His call completed, the stranger came back to where Ms. Holten was standing. Ms. Holten had, in the meantime, obtained a pencil and paper in the form of a calendar. The stranger, in Ms. Holten's immediate presence, wrote down a name ("Bill" or "Billy") and a telephone number on the calendar. Instructing Ms. Holten to have Mr. Frazier call him at the number in the note, the stranger departed.

Ms. Holten stayed in her yard for a few minutes and then went back into her house. Ms. Holten was inside her house making preparations to go out when she became aware that the stranger had entered the hallway of her apartment. When she saw him reach into his pants and produce a gun, she fled into the bathroom with the stranger in pusuit. Ms. Holten slammed the bathroom door, trapping the stranger's arm, and braced herself against the radiator opposite the door. The stranger, who was waiving the gun around inside of the bathroom, threatened Ms. Holten and demanded money. Suddenly, for reasons known best to himself, the stranger withdrew his arm from the bathroom door and left Ms. Holten's apartment.

As the stranger came out the front door, he encountered Rodney Frazier, who was coming up the front steps having been summoned to his step-mother's aid by others who had fled her house earlier. When the two met, the fatal shots were fired, and the stranger fled.

When Rodney Frazier was taken to the hospital, some member of his family took along the calendar with the name and telephone number. Later that evening, it was given to a police detective. The officer, rather than entering it in evidence, xeroxed the note and gave the page with penciled entry to Ms. Louise White, who was a friend of Ms. Holten. Ms. White was not called to testify.

The evening after the homicide, Detective Dyson, who was supervising the investigation, was making up the investigative file and noticed that both the note and the xeroxed copy were missing. A search of the Homicide Squad's office was fruitless, and the disappearance of the xeroxed copy was never explained. Detective Dyson r[illegible] inquiries of the witnesses and discovered that the ori[illegible], in the interim, been seized pursuant to a search [illegible] executed by agents of the Federal Bureau of Alcohol, Tobacco and Firearms (BATF). Detective Sharkey, Detective Dyson's supervisor, had been present at the execution of the unrelated BATF warrant. Later police inquiries at BATF revealed that the government had destroyed the calendar containing the crucial entry.

At trial, Ms. Holten, whose eyesight was by her own admission impaired, was the only witness who identified the defendant, Mr. Brown, as being the man who entered her apartment.[1] Of the four government witnesses who testified either to the prior conversation between Ms. Holten and the

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[1] Ms. Holten did not see the actual shooting but evidence of the juxtaposition of the stranger's leaving the apartment and the shots, which Ms. Holten did hear, make it almost certain that Ms. Holten's assailant was Rodney Frazier's killer.

stranger in the front yard or to the actual shooting, none identified Mr. Brown.[2]

Mr. Brown, and three members of his family, testified that on the night of November 2, 1974, Mr. Brown had been at a birthday party for his niece. He flatly denied his involvement in the killing of Rodney Frazier.

The jury convicted Mr. Brown, and the court sentenced him to no less than eighteen and one third years and no more than life. His conviction was affirmed by the District of Columbia Court of Appeals.

Before trial, Mr. Brown had filed a written motion for production of the missing note. The trial court refused to rule on the motion, or even to hear evidence or argument on it, contenting itself with the observation that since the note was missing, the motion could not be complied with. The appeals court similarly refused to order a hearing on the issue. A federal question is presented because the denial of Mr. Brown's right to be heard on the circumstances surrounding the destruction of the missing evidence and on the question of what steps the court should have taken to protect his right to a fair trial contravened the due process clause of the Fifth Amendment to the United States Constitution.

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[2] The witnesses' descriptions of the stranger varied from 5'7" to 6'2"; 135 to 175 pounds; short to long hair; moustache or no facial hair; limping or not limping. Another government witness placed Mr. Brown in the neighborhood three days after the shooting.

REASONS FOR GRANTING THE WRIT

Summary

This case presents significant questions concerning the administration by the federal courts of the rules of discovery in criminal cases.[3] The case also raises questions concerning the obligation of the prosecution to turn over to the defense evidence that may exculpate the defendant. In addition, this case has implications for the manner in which cases arising under the Jencks Act, 18 U.S.C §§ 3500, *et seq.*, are decided.

The principal question presented by this case is whether an appellate court can properly decide a question concerning the non-preservation of evidence without a remand in a case in which the trial court had previously denied the defendant a hearing on the issue.

Put another way, the question is whether an appellate court can properly extract from a record a finding as to the circumstances and consequences of a loss of producible evidence without giving the defendant an opportunity to try to develop evidence and arguments showing that the government's destruction of the evidence was improper and that the defendant's right to a fair trial was denied.

This set of questions arises in a large number of cases. Once evidence is found to be producible – whether under the criminal discovery rules, under *Brady*,[4] or under the

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[3] This case arose in the local District of Columbia courts. However, it was decided under Rule 16, Super. Ct. R. Cr. P., which was not significantly different from the criminal discovery rules in the federal courts. *Compare* Rule 16, F. R. Cr. P.

[4] *Brady v. Maryland*, 373 U.S. 83 (1963).

Jencks Act – it is absolutely necessary for the trial court to hold a hearing and to give the defendant an opportunity to develop a record on which the trial court in the first instance, and possibly later the appellate court, can give full and fair consideration to the issue of what the appropriate judicial response to the destruction of the producible evidence should be.

This case graphically demonstrates the unfairness of denying the defendant the opportunity to have such a hearing. Mr. Brown filed a written motion specifically demanding production of the missing document. The trial court declined to inquire into the circumstances of the destruction of the document, or even to decide the question, saying only that the lost document by definition could not be produced. The appellate court, after correctly finding that the document was indeed producible by the government and therefore subject to an antecedent duty to preserve on the part of the government, proceeded to divine the circumstances of the loss from a record that contained no hearing on the subject. The Court of Appeals then went on to decide the question that the trial court had refused to decide – what remedy might properly have been fashioned by the trial court to protect Mr. Brown's right to a fair trial. Mr. Brown has thereby been convicted and sentenced to spend a good part of his adult life in jail without ever having had the opportunity to present evidence on this question to the courts. Such a result cannot square with due process of law.

A second, and related issue, is presented by the opinion of the court below. Having brushed aside Mr. Brown's request for a hearing, the court purported to isolate three factors that it claimed led to the conclusion that the trial court could not properly have imposed sanctions in this case. The

three factors were: 1) the loss of the xeroxed copy was inadvertent and not the result of governmental bad faith; 2) the government tried promptly to recover the original; and 3) the outcome of an analysis of the handwriting in the note would not necessarily have exculpated Mr. Brown.

Mr. Brown argues that even if it had been proper to decide the case without a record upon which to base the decision, the factors the court considered were not the ones it should have considered.

This Court has recently pointed out that the good faith or bad faith of the prosecutor is irrelevant in cases involving the prosecution's duty to preserve and disclose evidence. *United States v. Agurs*, 427 U.S. 97, 110 (1976). The real question to be examined, this Court has said, is the impact of the undisclosed evidence on the defendant's right to a fair trial. *Agurs, supra*, 427 U.S. at 108.

Where the evidence is undisclosed because it is lost or destroyed, the evidence is, by definition, unavailable. In the situation where lost or destroyed evidence is unavailable, the court should assume the evidence would have tended to exculpate the defendant. Then the court should inquire whether, in the context of the whole record, the missing evidence, presumed favorable to the defendant, would have created a reasonable doubt that did not otherwise exist. *Agurs, supra*, 427 U.S. at 112.

The key to the test is the presumption that the evidence, if not lost or destroyed, would have tended to exculpate the defendant. To refuse to indulge that presumption would be to place on Mr. Brown a burden which is by its own terms impossible to carry – the burden of showing that evidence not available to him through no fault of his own would in fact have buttressed his defense.

Several terms ago, in *United States v. Agurs, supra,* 427 U.S. 97 (1976), this Court brought a measure of order to the closely related field of law concerning the standards that apply where the prosecution fails to disclose producible evidence that it has in its files. Mr. Brown's case calls upon the Court to speak authoritatively concerning the standards to be applied when the prosecution cannot disclose evidence because the evidence has been lost or destroyed.

I. THE APPEALS COURT IGNORED ABUNDANT AUTHORITY HOLDING THAT QUESTIONS CONCERNING THE GOVERNMENT'S NON-DISCLOSURE OF PRODUCIBLE EVIDENCE SHOULD, IN THE FIRST INSTANCE, BE DECIDED IN THE TRIAL COURT SO THAT THE DEFENDANT HAS THE OPPORTUNITY TO DEVELOP A RECORD ON WHICH TO BASE HIS CLAIM THAT HE WAS ENTITLED TO A REMEDY.

In this case, Mr. Brown's trial counsel filed a written motion demanding that the government produce the missing note written by the person who killed the victim. The trial court refused to rule on the motion, much less hold a hearing on it, saying only "Well, how can I rule on it? . . . Other than to deny it? . . . It can't be complied with." 372 A.2d at 559. App., *infra,* p. 4a.

In his brief on appeal in the court below, Mr. Brown's appellate counsel urged the court to remand the case to the trial court so that he could develop a record upon which to base his claim for a judicial remedy.[5] The appellate court declined saying:

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[5] See Brief for Appellant, page 15, in *Brown v. United States,* No. 10482, District of Columbia Court of Appeals.

> Where the trial court has not considered such an issue properly raised before it, we would normally remand to the trial court for such consideration. However, given the undisputed evidence in this record, no remand is necessary. 372 A.2d at 561; App., *infra,* p. 8a.

This shortcut was completely improper. The evidence in the record was undisputed for the simple reason that Mr. Brown had been denied an opportunity to dispute it.

Eighteen years ago, in the context of the determination of what constitutes a "statement" under the Jencks Act, this Court said in *Palermo v. United States,* 360 U.S. 343, 354-55 (1959):

> It is also the function of the trial judge to decide, in the light of the circumstances of each case, what, if any, evidence extrinsic to the statement itself may or must be offered to prove the nature of the statement.

Two years later, in the first of the *Campbell* cases, *Campbell v. United States,* 365 U.S. 85, 92 (1961) (*Campbell* I), the Court made the requirement even more explicit:

> . . . the trial judge conducted an inquiry without the jury present to take testimony and hear argument of counsel. Plainly enough this was a proper, even a required, proceeding in the circumstances. Determination of the question of whether the Government should be ordered to produce government papers could not be made from a mere inspection of the Interview Report, but only with the help of extrinsic evidence.

The *Campbell* case was remanded by this Court for a new hearing and a proper application of the Jencks Act. When the *Campbell* case came back up to this Court, the Court in its second opinion, *Campbell v. United States*, 373 U.S. 487, 493 (1963) (*Campbell* II), reenforced its holding that such issues should be fully heard in the trial court. The Court held that deciding what constituted a Jencks Act statement:

> was preeminently a task for a *nisi prius*, not an appellate court. It required the *ad hoc* appraisal of one of the "myriad" "possible permutations of fact and circumstance," *Palermo v. United States*, *supra*, at 353, present in such cases; it may well have depended upon nuances of testimony and demeanor of witnesses; and it concerned a subject, rulings on evidence, which is peculiarly the province of trial courts. (footnote omitted.)

The same principles apply to cases in which evidence must be produced pursuant to the rules of criminal discovery or pursuant to *Brady*. In both cases, a trial court should initially hear evidence and determine whether the missing item is in fact producible, what harm the defendant has suffered, and what remedies are appropriate to protect the defendant's right to a fair trial. The analogy between the Jencks cases on the one hand, and the discovery and *Brady* cases on the other had already been made explicit in the District of Columbia when Mr. Brown's case was decided. The government's duty to preserve producible evidence had already been affirmatively declared in *United States v. Bryant*, 142

U.S. App. D.C. 132, 439 F.2d 642 (1971).[6] Federal cases following Bryant had expressly held that the issues surrounding the loss of producible evidence should be thoroughly aired in the trial court. *United States v. Butler*, 163 U.S. App. D.C. 1, 2, 499 F.2d 1006, 1008 (1974); *United States v. Maynard*, 155 U.S. App. D.C. 223, 230-31, 476 F.2d 1170, 1178 (1973). The opinion of the Court of Appeals itself recognized that a remand would be appropriate. 372 A.2d at 561; *App., infra*, p. 8a.[7]

The questions surrounding the loss of the note were questions of fact, and questions of fact are properly resolved in the trial court. If they had been resolved in the trial court, Mr. Brown would have had an opportunity to examine the officers who gave the original of the note away to Louise White. He could have examined the federal officers who later seized the original, in the context of another case, and destroyed it. He could have examined the officer who lost the xeroxed copy. By expert testimony, he might have challenged the assertion, made in the Court of Appeals opinion, that the note was too brief to have had significance for handwriting analysis. In short, he would have had an opportunity to make a record on which to base a request for a remedy. The Court of Appeals, by determining questions of fact without a hearing having been held, denied him the right to be heard, a fundamental component of due process.

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[6] *Bryant* was decided before February 1, 1971, when the federal courts ceased to exercise the majority of the criminal jurisdiction in the District of Columbia. Therefore, *Bryant* is binding precedent on the District of Columbia Court of Appeals. *See M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C.C.A. 1971).

[7] *See e.g., Johnson v. United States*, 298 A.2d 516, 519 (D.C.C.A. 1972), remanding for a hearing on the loss of Jencks Act materials.

II. EVEN ASSUMING THAT THE COURT OF APPEALS COULD PROPERLY HAVE DETERMINED THE ISSUE OF THE LOST EVIDENCE, IT DECIDED THE ISSUE ON THE BASIS OF THREE ERRONEOUS CONSIDERATIONS.

The Court of Appeals concluded that no error had been committed because no remedy could properly have been fashioned by the trial court. In reaching that conclusion, the court relied on three factors: 1) the loss of the xeroxed copy was inadvertent and not the result of governmental bad faith; 2) the government tried promptly to recover the original; and 3) no one could say whether analysis of the handwriting in the missing note would have buttressed Mr. Brown's defense of mistaken identity. None of these factors was a proper basis for the court's conclusion. Mr. Brown addresses each of them *seriatim.*

First, passing the correctness of the court's conclusion on the good faith/bad faith issue, this Court has recently and forcefully declared that the issue of non-production of producible evidence turns on the defendant's right to a fair trial, and not on the motives of the prosecutor. As Mr. Justice Stevens put it forcefully in *United States v. Agurs,* 427 U.S. 97, 110 (1976):

> If suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.

Of course, once the inquiry is framed in terms of the character of the evidence, the answer becomes more readily apparent. It is difficult to imagine evidence more critical to a defendant than the note in this case. Analysis of the handwriting in the missing note might have completely exonerated the defendant if he could have shown that some other hand but his had written it. Such proof would have been a major prop to Mr. Brown's defense. By destroying the note, the government deprived Mr. Brown of the opportunity to use it in his defense. The defendant's right to present his defense fully goes to the heart of the issue of fair trial.

As to the second factor relied upon by the court, it is difficult to know what significance the court attached to the "dispatch" with which the police sought to regain the original.[8] Perhaps the court thought the prompt efforts of the police were yet another sign of their good faith. If so, this second consideration was also irrelevant on the grounds already mentioned.

However, the court's opinion is particularly hard to evaluate in this respect since it entirely neglects to mention the fact that the note did in fact come back a second time into the posession of the government, which then destroyed it. After the note had been returned to the neighbor of the woman who had first given it to the police, it was seized pursuant to an unrelated search warrant A District of Columbia police officer who was tangentially involved in the investigation of the homicide in this case was present during the execution of this warrant. Nevertheless, the note was subsequently destroyed by the government together with other miscellaneous papers.

Although a different arm of the government came into posession of the note the second time, the government

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[8]Of course, the original had not been lost at all. It had been advertently given away by the police, not to its owner, but to a neighbor of its owner, Louise White.

is chargeable with knowledge of what it has in its posession. The right hand of the government is required to communicate with its left. *Santobello v. New York,* 404 U.S. 257, 262 (1971). Bureaucratic ineptitude is not a justification for violating a defendant's constitutional rights.

The third consideration cited by the court below was the "speculation" involved in deciding whether the note would in fact have been useful to the defendant. In this regard, the court's opinion is entirely at war with itself. On the page before, the court had recognized that the rule should be that doubts created by the failure of the government to preserve evidence should be resolved in favor of the defendant.

> . . . it was the style of the handwriting that was important. Given the loss of the documents, the style of the handwriting could not be established. Thus, were we to hold that where evidence is lost, a defendant is still required to meet the *Agurs* "outcome determinative" standards, we would be imposing a task often impossible to perform. For, as here, there will often be no method by which a defendant can establish the impact of the evidence, through no fault of his own. 372 A.2d at 560; App., *infra,* p. 7a.

Later in the same paragraph the court stands its own rule on its head and denies Mr. Brown relief partly on the grounds that the outcome of the handwriting analysis was a matter "subject only to speculation."

In truth, the court creates a problem here that need not exist. The proper resolution in such cases is to assume the missing evidence would have favored the defendant and then to ask whether, on that assumption, it was the type of evidence that might have affected the outcome of the case. On the proper analysis, the answer is clearly that a handwriting analysis showing that someone other than the defendant had written the note would almost surely have changed the jury's verdict.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the writ of certiorari should be granted.

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August 15, 1977

APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 10482

BRADFORD BROWN, APPELLANT,

v.

UNITED STATES, APPELLEE.

Appeal from the Superior Court of the District of Columbia

(Hon. Norma H. Johnson, Trial Judge)

(Argued November 30, 1976 Decided April 14, 1977)

William Jordan Temple for appellant.

David R. Addis, Assistant United States Attorney, with whom *Earl J. Silbert*, United States Attorney, and *John A. Terry*, Assistant United States Attorney, were on the brief, for appellee.

Before NEWMAN, *Chief Judge*, and NEBEKER and HARRIS, *Associate Judges*.

NEWMAN, *Chief Judge*: Appellant, Bradford Brown, convicted by jury of second-degree murder, assault with a dangerous weapon, and carrying a pistol without a license, was sentenced to terms of confinement. He appeals asserting as reversible error: (1) the failure of the government to preserve certain evidence which, he con-

tends, constitutes a breach of a duty implicit in Super. Ct. Cr. R. 16 as well as a denial of due process; and (2) the insufficiency of the evidence. Concluding that there is no reversible error, we affirm.

In the evening hours of November 2, 1974, Ms. Holton and Mr. Baltimore were outside her residence in the District of Columbia. The area was well lit. A man, later identified by Ms. Holton as appellant, approached and inquired of the whereabouts of Mr. Frazier, a friend of Ms. Holton. Mr. Frazier not being available, the man wrote the name "Bill" and a phone number on a piece of paper, gave it to Ms. Holton, and requested that she have Mr. Frazier call him at that phone number. A matter of minutes thereafter, while inside her residence, Ms. Holton again encountered appellant standing in her apartment brandishing a pistol. Ms. Holton fled with appellant in pursuit, demanding that she surrrender any items of pecuniary value in her possession. The arrival of other persons on the scene apparently frightened appellant for he began fleeing the premises. At the front of the premises he was confronted by decedent whom he shot to death and made good his escape.

During the course of the investigation, Ms. Holton gave the note to homicide detectives who, after making a photocopy of same, returned the original either to Ms. Holton or to someone on her behalf. Shortly thereafter, the homicide detective discovered that the copy had been misplaced. Upon contacting Ms. Holton to retrieve the original, he learned of its loss as well.

Appellant, by written pretrial motion with appropriate memorandum of points and authorities, sought production of the note. The government, while able to disclose to appellant the apparent verbatim content of same, was unable to produce either the original or the copy. When

apprised of the loss of both the original and the copy, the trial court denied appellant's motion to produce. It is this ruling with respect to the document itself as opposed to its message content which appellant contends transgresses *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, as well as, by analogy, the Jencks Act, 18 U.S.C. § 3500 (1970), and cases construing that statute that constitutes appellant's first assignment of error.

Although present Super. Ct. Cr. R. 16(a)(1)(c) speaks in mandatory terms given certain conditions, the rule at the time of this motion did not. The applicable portion [Super. Ct. Cr. R. 16(b)] then read:

> (b) Upon motion of a defendant, the court may order the prosecutor to permit the defendant to inspect and copy or photograph . . . papers, documents, tangible objects . . . which are within the possession, custody or control of the government upon a showing of materiality to the preparation of his defense and that the request is reasonable.

If, under the rule as then applicable, the trial court knowingly exercised discretion to deny the motion to produce, our review would be limited to an "abuse of discretion" standard, *Xydas v. United States*, 144 U.S. App.D.C. 184, 445 F.2d 660 (1971). We must examine the trial court's ruling to determine whether it purports to be an exercise of discretion. The colloquy between the court and counsel was as follows:

> DEFENSE COUNSEL . . . [Government has not produced the note] . . .
>
> ASSISTANT UNITED STATES ATTORNEY: . . . The note has been lost, for the court's information. The police lost them.

DEFENSE COUNSEL: We already have testimony that it was given to the police. . . .

* * * * *

DEFENSE COUNSEL: The . . . [discovery motion I refer to is the one] . . . in which I asked for the note since I hadn't been informed that it was lost, and out of an abundance of caution, and as I stated to the Court, the statement in *United States v. Scriber*, I felt that the motion had to be filed at this time.

THE COURT: And what is it that you wish that you do not have?

DEFENSE COUNSEL: The note given by the assailant to Margaret Holton, and then given by her to the Metropolitan Police Officer investigating the homicide at the time of the investigation.

THE COURT: Now didn't . . . [Assistant United States Attorney] . . . say that the note has been lost?

DEFENSE COUNSEL: Yes he did.

THE COURT: Is that what you stated for the record.

ASSISTANT UNITED STATES ATTORNEY: Yes, I really tried to find it.

THE COURT: Well, you were looking for it because you thought it would help your case and that's why?

ASSISTANT UNITED STATES ATTORNEY: Yes.

THE COURT: Well, how can I rule on it? . . . Other than to deny it? . . . It can't be complied with.

The Court and counsel then turned their attention to other matters not here relevant.

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As noted, appellant places principal reliance in his assertion that loss of both the original and the copy of the notes constitutes reversible error on two lines of cases—the line beginning with *Brady v. Maryland*, *supra*, which includes *Moore v. Illinois*, 408 U.S. 786 (1972), and *United States v. Agurs*, 427 U.S. 97 (1976), and a second line beginning with *United States v. Bryant*, 142 U.S.App.D.C. 132, 439 F.2d 642 (1971), and including *Marshall v. United States*, D.C.App., 340 A.2d 805 (1975).[1]

In *Brady*, *Moore*, and *Agurs*, a common factor existed. The evidence sought to be produced was extant at the time production was claimed to be due. It is this feature which takes this case out of the strict holding of each of these cases. Rather, the issue presented here is three-fold: (1) would the document in question if extant in the possession of the government at the time of demand have been subject to a valid motion to produce under Super. Ct. Cr. R. 16(b); (2) if so, did the government have a duty to preserve the document so as to be able to produce it upon motion, and (3) if there was a duty to preserve, was it breached in this case and, if so, what consequences flow therefrom.

Although, given their absence, we can not know what the result of handwriting analysis would have been, it is clear that these documents were discoverable material within the ambit of Super. Ct. Cr. R. 16(b). *Marshall v. United States*, *supra*. Thus, we must turn

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[1] It is important to recognize that this is *not* an issue of Jencks Act production. 18 U.S.C. § 3500. Appellant does not contend the note to be producible as a substantially verbatim statement under the Jencks Act. In this he is correct. Rather, he sought production under then Super. Ct. Cr. R. 16(b).

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to the second question—was there a duty to preserve in order to be able to produce.

In *United States v. Augenblick*, 393 U.S. 348 (1969), the Supreme Court suggested that the duty to produce entailed an antecedent duty to preserve.[2] In *United States v. Bryant, supra*, the court, placing strong reliance on *Augenblick*, held that a duty to disclose under 18 U.S.C. § 3500 entailed an antecedent duty to preserve. As noted, both *Augenblick* and *Bryant* involved Jencks situations. That this distinction from the present case is without dispositive significance is shown by our decision in *Marshall*.[3] There we recognized that court decisions and Metropolitan Police Department regulations require preservation of items which are subject to a motion to produce.[4]

While our decision in *Marshall* does not explicitly decide the question of sanctions under Rule 16, we proceeded in that case to analyze the question of sanctions by analogy to *Brady* and *Bryant*. A similar analysis is helpful here.

In the line of so-called *Brady* cases, we find three types of situations. The first involves knowing use by the government of perjured testimony. Where this occurs,

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[2] The item sought was a tape recording of a statement productible under 18 U.S.C. § 3500, the Jencks Act. The Supreme Court noted that neither its decision in *Jencks v. United States*, 353 U.S. 657 (1975) nor 18 U.S.C. § 3500 was cast in constitutional terms, although denial of production might in some circumstances violate the Sixth Amendment.

[3] In *Marshall*, the item in question was a stolen purse. Its production was sought so that fingerprint analysis could be made in an attempt to identify the thief.

[4] *Cf. United States v. Scriber*, 163 U.S.App.D.C. 36, 499 F.2d 1041 (1974).

the conviction violates due process if there is any reasonable likelihood that the false testimony could have affected the judgment. *Mooney v. Holohan*, 294 U.S. 103 (1935); *Giglio v. United States*, 405 U.S. 150 (1972). The second is typified by *Brady, supra*, where pretrial demand was made for specific evidence. Where this occurs, the test is whether the non-disclosed evidence was material, favorable to the accused, and might have affected the outcome of the trial. The third is illustrated by *United States v. Agurs, supra*, where no demand was made. In such circumstances due process mandates a new trial only if the omitted evidence creates a reasonable doubt in the mind of the court which otherwise would not exist.

It bears repeating, in all these cases the evidence sought to be produced was extant at all relevant times, where here, it was not. The importance of this fact rests in the availability of the items for independent evaluation of evidentiary impact. Where the evidence is lost, it is difficult, if not impossible, to make such an independent evaluation. This case presents a classic example. The written content of the note was clearly established. However, the content is not what was at issue. Rather, it was the style of handwriting that was important. Given the loss of the documents, the style of handwriting could not be established. Thus, were we to hold that where the evidence is lost, a defendant is still required to meet the *Agurs* "outcome determinative" standards, we would be imposing a task often impossible to perform. For, as here, there will often be no method by which a defendant can establish the impact of the evidence, through no fault of his. Conversely, it would be absurd to structure a rule which would require the government to preserve every shred of evidence obtained during a criminal investigation no matter how minimal

or tangential its relevance. *Cf. Moore v. Illinois, supra.* Thus, while it is proper to focus solely on the impact on the defendant's trial in cases of claimed constitutional error where there is extant non-disclosed evidence, *Agurs, supra,* at 109-113; where the evidence producible pursuant to a Rule 16 motion has been lost, a different test is appropriate. While we do not purport to fashion a precise test herein, any appropriate test must require an evaluation of (1) the circumstances occasioning the loss; (2) systematic steps taken toward preservation; and (3) the magnitude of demonstrated evidentiary materiality. In other words, any such test would require an evaluation and balancing of various factors. This is a function in the first instance for the trial court. Where the trial court has not considered such an issue properly raised before it, we would normally remand to the trial court for such consideration. However, given the undisputed evidence in this record, no remand is necessary. The record here is clear and undisputed that there was no intentional or bad faith loss. The loss of the copy apparently occurred inadvertently and immediately after it was made. With dispatch, the police sought to obtain the original without success. Further, whether any handwriting analysis would have been possible given its brevity and the outcome of such analysis if made, are matters subject only to speculation. In light of all the circumstances, we are satisfied that the trial court would have denied a request for sanctions for to have done otherwise would have been an abuse of discretion.[5]

[5] These circumstances are in stark contrast to those in *Bryant* which the court described as follows:

> It is important to recognize that this is not a case of good faith effort to preserve highly relevant evidence, frustrated only by inadvertent loss. Rather, it is a case of intentional nonpreservation by an investigating official. [142 U.S.App.D.C. at 137, 439 F.2d at 647.]

A constitutional analysis does not lead to a different result for it is clear that no due process right of the appellant was violated in this case. *Cf. March v. United States,* D.C.App., 362 A.2d 691, 702-704 (Section IV) (1976).

Appellant's next contention relates to the sufficiency of the evidence that he was the perpetrator of the offenses. We must view the evidence in its light most favorable to the government, and determine whether or not a reasonable mind could conclude guilt beyond a reasonble doubt from the evidence presented. *Crawford v. United States,* 126 U.S.App.D.C. 156, 158, 375 F.2d 332, 334 (1967); *Curley v. United States,* 81 U.S.App.D.C. 389, 392, 160 F.2d 229, 232 (1947). Here, there is an eyewitness identification based on observations under favorable circumstances as to lighting, duration, and stimuli to observe keenly; coupled with three subsequent identifications by the eyewitness; all of which are positive and unwavering. In addition, the testimony of other witnesses including that of the defendant himself gave weighty corroboration to the identification of appellant as the culprit. This claim of error is without merit. *Cf. Marshall v. United States, supra; Williams v. United States,* D.C.App., 355 A.2d 784 (1976).

Affirmed.